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Contempt - Misconduct in Presence of Court - Limits on the Power to Punish Summarily for Contempt

CONTEMPT — MISCONDUCT IN PRESENCE OF COURT — LIMITS ON THE POWER TO PUNISH SUMMARILY FOR CONTEMPT

THE RECENT case of *Fisher v. Pace* [1] has again raised the question of the proper exercise by the courts of power to punish summarily for contempt in the light of both constitutionality and justice. In that case an attorney was punished for contempt when he repeated in a different form an argument to the jury to which an objection had been sustained.[2] Previously in *Caldwell v. United States,*[3] a case with facts analagous to *Fisher v. Pace,* the exercise of such power was held unwarranted, since a willful attempt to evade the court's ruling was insufficiently shown.[4] In that case the the court said: "Thus suddenly to punish for conduct of doubtful propriety only, where the intent to be insubordinate is not clear, might very well have the result of deterring an atttorney of less courage and experinence from doing his full duty to his client." [5] Between the two points of view an inconsistency obviously exists, and thus the question arises as to which case reaches the better result.

FUNDAMENTALS OF CONTEMPT

In considering the power of a court to punish for contempt, it first becomes necessary to determine what class of contempt is involved. Generally, contempts may be divided into two classes, direct and constructive, the test being whether the misbehavior constituting the contempt is committed within or outside the presence of the court.[6] If the contempt is committed within the presence of the court it is a direct contempt. Contempts, however are also classed as civil or criminal. Whether a contempt action is civil

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[1] 336 U.S. 155 (1949); See also 34 Iowa L. Rev. 673 (1949).

[2] Attorney Fisher was attempting to explain the difference between specific injury and general injury in an action under state workmen's compensation law and in so doing mentioned that for a specific injury the most compensation he could receive would be for 125 weeks, and this times the average weekly compensation rate. This was objected to and the objection sustained. He then stated that his client could only recover 125 weeks compensation at whatever compensation the rate will figure under the law. Objection was again sustained, and Fisher attempted to explain his position. The court said, "Don't argue with me." The court also threatened to declare a mistrial if he "*messed*" with him. Fisher took exception to the conduct of the court and then the court fined him. Eventually the fine was up to $100.00 and three days in jail, after Fisher had remarked that he shouldn't be fined for trying to represent his client. On certiorari it was held that he was not denied due process; Fisher contended unsuccessfully that no facts constituting contempt appeared.

[3] 28 F.2d 684 (9th Cir. 1928).

[4] Punishment of attorney as for contempt by imposing $50.00 fine on attorney's question on cross examination, "Isn't it a fact you registered under the name of Kennard?" after the court had sustained objection to the previous question, "You registered under what name?"

[5] 28 F.2d 684 (9th Cir. 1928).

[6] This is not an easy test to apply. O'Mally v. United States, 128 F.2d 676 (8th Cir. 1942), *Rev'd sub nom.* 317 U.S. 412 (1943), on other grounds.

or criminal is, oddly enough, a problem often turning on fine distinctions. The rule most often laid down as the test is that criminal contempt proceedings are brought to preserve the power and vindicate the dignity and integrity of the court and to punish for disobedience of its orders, whereas civil contempt proceedings are brought to preserve and enforce the rights of private litigants and to compel obedience to orders and decrees made for the benefit of such litigants.[7] A further distinction may be drawn between civil and criminal contempt cases in that the judgment in a civil contempt case is remedial, coercive, and looks to the future, while the judgment in the latter class is punitive and punishes a past act.[8] The nature of the relief sought determines whether the contempt proceedings is civil or criminal.[9]

As the two cases previously mentioned, *Fisher v. Pace* and *Caldwell v. United States*, involve direct, criminal contempt, this comment is limited to the power to punish summarily for direct, criminal contempt. Historically the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of a jury is not open to question.[10] Direct contempts are punishable without granting the contemnor a hearing or chance to present defense.[11] Such summary conviction and punishment has been held due process of law, the reasoning being that it is essential to the protection of the courts in the discharge of their functions.[12]

Guiding Principles in the Application of such summary Power

In the application of the foregoing general principles, we should not attempt to apply the generalizations to every case. They should not be applied indiscriminately and in a haphazard manner. Thus, the courts should bear in mind a few guiding principles. There are many, but some of the relevant ones are discussed hereafter and should be applied so as not to deprive one of due process of law. Liberties guaranteed by the First Amendment are too highly prized to be subjected to the hazards of summary contempt procedure.[13]

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[7] *See* O'Mally v. United States, 128 F.2d 676, 683 (8th Cir. 1942).

[8] Nye v. United States, 313 U.S. 33 (1941); Walling v. Crane, 158 F.2d 80 (5th Cir. 1946).

[9] Penfield Co. v. Sec. 330 U.S. 585 (1947).

[10] 4 Bl. Comm. 284 *et seq. In re* Oliver, 333 U.S. 257 (1948); Eilenbecker v. District Court, 134 U.S. 31 (1890); *Ex parte* Savin, 131 U.S. 267 (1889); *Ex parte* Terry, 128 U.S. 289 (1888); O'Mally v. United States, 128 F.2d 676 (8th Cir. 1942).

[11] *Ex parte* Terry, 128 U.S. 289 (1888).

[12] *Ex parte* Terry, 128 U.S. 289 (1888). *But cf. Ex parte* Hudgings, 249 U.S. 378 (1919) (Perjury alone not punishable by contempt proceedings unless an actual obstruction to the court in the discharge of its duty appears.)

[13] *See* Craig v. Harney, 331 U.S. 367 (1946); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

The Constitution forbids a judge from summarily punishing for contempt except in rare instances where the attack might reasonably cause a real impediment to the administration of justice.[14] The inherent power to punish for contempt does not mean that such power is unlimited. The power to punish for contempt should be exercised with great caution, and only as a preservative and not as a vindicative measure.[15] Summary punishment for contempt is permissible only when it is essential to prevent demoralization of the court's authority before the public.[16] In *Toledo Newspaper Co. v. United States,*[17] a case of contempt by publication, it was held that so long as the misbehavior has a *reasonable* tendency to obstruct the administration of justice, it is punishable.[18] However, this was completely overruled in later decisions where it was held that the misbehavior must present a "clear and present danger" to the administration of justice.[19] In *Bridges v. California* [20] the clear and present danger rule was applied to form the working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. The test to be applied is not the remote or possible effect, but the danger must immediately impend.[21] The exercise of the power to punish summarily for contempt ". . . is a delicate one and care is needed to avoid arbitrary or oppressive conclusions," said Mr. Justice Taft in *Cooke v. United States.*[22] *In Clark v. United States*[23] it was said that the occurrence must be viewed as a unit in order to appraise properly the misconduct, and the relationship of the contemnor (in this case a juror) as an officer of the court must not be lost sight of. In Ex parte *Terry* [24] the court gave no encouragement to the expansion of the power to sentence for contempt, be-

[14] Craig v. Harney, 331 U.S. 367 (1946).

[15] Redman v. United States, 77 F.2d 126 (9th Cir. 1935); *In re* La Varre, 48 F.2d 216 (S.D. Ga. 1930). *Cf.* Cooke v. United States, 267 U.S. 517, 529 (1925) (Where an attorney remarked, "It is an unfortunate situation that a lawyer may, with flattery and praise, seek to and actually influence judicial action, but he cannot speak the truth with candor without being sent to jail. This is not as it should be.")

[16] *In re* Oliver, 333 U.S. 257, 275 (1948). But compare the *Oliver* case with Craig v. Harney, 331 U.S. 367 (1946).

[17] 247 U.S. 402 (1918).

[18] Mr. Chief Justice White, delivering the opinion of the court, said, ". . . not the influence upon the mind of the particular judge is the criterion but the responsible tendency of the acts done to influence or bring about the fateful result is the test." 247 U.S. 402, 421 (1918).

[19] Nye v. United States, 313 U. S. 33 (1941). Compare the dissenting opinion of Mr. Justice Holmes in the *Toledo Newspaper* case with the opinion in Schenck v. United States, 249 U.S. 47 (1919), the case generally credited with establishing the "clear and present danger" rule.

[20] 314 U.S. 252 (1941).

[21] Craig v. Harney, 331 U.S. 367 (1946). Pennekamp v. Florida, 328 U.S. 331 (1945).

[22] 267 U.S. 517, 539 (1925).

[23] 289 U.S. 1 (1933) (juror held guilty of contempt for false statements made while being examined as to qualifications).

[24] 128 U.S. 289 (1888).

yond the suppression and punishment of any court-disrupting misconduct which alone justified its exercise. In the *Terry* case, Terry committed an assault on the marshall who was at the moment removing a heckler from the courtroom. This occurred within personal view of the judge. Under such circumstances a court has the power to punish summarily for contempt. However, the court cited *Anderson v. Dunn*,[25] which had marked the limits of contempt in general as being "the least possible power adequate to the end proposed." [26] The *Terry* case was noted in *Cooke v. United Sates, supra,* its language, however, not being interpreted as authority to depart from basic due process procedural safeguards. The distinction between the *Terry* case and the *Cooke* case is that in the *Cooke* case the contempt was adjudged by reason of a contemptous letter, and thus the contempt was not in *open court.* Also as distinguished from Ex Parte *Terry,* see In re *Oliver*,[27] where a witness was cited for contempt for giving false and evasive testimony. He was not in court when other witnesses, upon whose testimony the judge arrived at his decision that the testimony was false, were testifying contrary to him. It was held that the circumstances of this case did not justify denial of due process, on the ground that this was not a proper application of the summary power for contempt committed in the court's actual presence.[28]

In Pennsylvania and New York heated controversies arose over alleged abuses in the exercise of the contempt power which in both places culminated in legislation practically forbidding summary punishment for publications in newspapers.[29] The summary power of federal courts does not extend to any case except the "misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." [30]

It becomes necessary at this point to digress for a minute to the subject of statutory construction. In *Cooke v. United States,*

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[25] 6 Wheat. 204 (U.S. 1821).

[26] Anderson v. Dunn, 6 Wheat. 204, 231 (U.S. 1821). See also *In re* Michael, 326 U.S. 224 (1945).

[27] 333 U.S. 257 (1948).

[28] *Cf. Ex parte* Craig, 274 Fed. 177 (2d Cir. 1921).

[29] See Nelles & King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 409-422, 525 (1928). In North Dakota, the publication of a "false or grossly inaccurate report" of the proceedings of a court is punishable as a contempt. N.D. Rev. Code §12-1724(7) (1943). *See* State v. Nelson, 29 N.D. 155, 150 N.W. 267 (1914) (publication of article alleging bias and political subservience to the Supreme Court). This case is probably not good law today. Craig v. Harney, 331 U.S. 367 (1946); Pennekamp v. Florida, 328 U.S. 331 (1945). *Cf.* State v. Root, 5 N.D. 487, 67 N.W. 590 (1896).

[30] 18 U.S.C. §401 (1948). The court may also punish by contempt proceedings the misbehavior of any of its officers in their official transactions and disobedience or resistance to its process.

supra, the court said in citing two cases,[31] "The statute does not require that the 'misbehavior' if committed in the presence of the court must also be of such character as to 'obstruct the administration of justice.' That qualification is required only as to misbehavior not committed 'in the presence of the court'." However, the interpretation of the courts, as indicated by the decisions noted in the following paragraphs, seem to be exactly contra to the above quotation. The two cases cited as supporting the above quotation make no mention of such an interpretation of the statute. It also may be well to note at this time the interpretation of the words "so near thereto" as used in the above statute. In *Nye v. United States* [32] it is said that these words are construed as geographical terms as distinguished from proximity in casual connection. In that case, the mere fact that there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court. However, Justice Stone, in dissent says that "near" may connote proximity in casual relationship as well as proximity in space, citing several cases where the injurious effect was unrelated to distance from the court.[33] However, if the words "so near thereto are not read in a geographical sense they come close to being mere surplusage. Thus it is clear that *Nye v. United States, supra,* overrules the theory that by statute, summary punishment for newspaper publication is authorized, and recognizes the substantial legislative limitations on the contempt power as indicated by the words "so near thereto." [34] In Ex parte *Craig,*[35] the contempt was held not near enough to obstruct justice, the court saying that, "Where contempt is committed without the presence of the court every reasonable doubt will be resolved in favor of the accused." Therefore, it seems the words "so near thereto" are geographical terms.

Ex parte *Hudgings* [36] demonstrates the necessity of an obstructive tendency to the administration of justice before the summary contempt power can be exercised. There a witness was adjudged in contempt of court for testifying falsely. The statement of the witness which was the basis for the contempt charge was,

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[31] *Ex parte* Hudgings, 249 U.S. 378 (1919); *Ex parte* Craig, 274 Fed. 177 (2d Cir. 1921).

[32] 313 U.S. 33 (1941).

[33] Sinclair v. United States, 279 U.S. 749 (1929); Craig v. Hecht, 263 U.S. 255 (1923); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918); *Ex parte* Savin, 131 U.S. 267 (1889).

[34] That "so near thereto" is a geographical term see Cuyler v. Atlantic & N.C.R.Co., 131 Fed. 95 (C.C.E.D. N.C. 1904); Hillmon v. Mutual Life Ins. Co., 79 Fed. 749 (C.C.D. Kan. 1897); *Ex parte* Schulenberg, 25 Fed. 211 (C.C.E.D. Mich. 1885).

[35] 274 Fed. 177 (2d Cir. 1921).

[36] 249 U.S. 378 (1919).

"I cannot say that I can recall that I have ever seen him in the act of writing. I would not say that I have not, but I would not say that I have." The witness held by this statement all through the inquiry, refusing to recognize the writings shown him. However, the court said that it was thoroughly satisfied, that he was testifying falsely and held him in contempt, as tending to obstruct the course of justice in the presence of the court. This decision was reversed on appeal the court saying, "an obstruction to the performance of judicial duty resulting from an act done in the presence of the court is the characteristic upon which the power to punish for contempt must rest. It is true that there are cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. This, however, overlooks or misconceives the essential characteristic of the obstructive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing." Therefore perjury alone is not sufficient, and the rule seems to be that there must be some circumstance or condition giving it an obstructive effect.[37] Mr. Justice Oliver in *Rex v. Davies*,[38] as to defamatory matter said that whether defamatory matter amounts to contempt in any particular case is a question of fact, of degree, and of circumstance. Thus, in ascertaining whether the acts and conduct of relator in the presence of the court justified the court in holding him in contempt, we must take into consideration all of the facts and circumstances concerning the case.[39]

In indirect or constructive contempt proceedings at common law, if a party could clear himself upon oath, he would be discharged; but if the statement was perjured, he may be prosecuted for the perjury.[40] Thus at common law by denying intent coupled with an explanation showing an innocent purpose, one could purge the contempt. The above rule, however, did not apply if the alleged acts were clearly contemptuous in character.[41] Also, where an officer of the court is himself guilty of violation of some court rule a disavowal on oath of any intent to violate, together with an explanation will be *conclusive*.[42] Thus, the intent to defy the dignity and authority of the court was a necessary element of criminal con-

[37] See also United States v. Appel, 211 Fed. 495 (S.D.N.Y. 1913); *In re* Michael, 326 U.S. 224 (1945).
[38] 1 K.B. 435 (1945).
[39] *Ex parte* Norton, 144 Tex. 445, 191 S.W.2d 713 (1946).
[40] See Notes, 6 R.C.L. 523, 534, 535; 9 L.R.A. (NS) 1119.
[41] United States v. Huff, 206 Fed. 700 (S.D. Ga. 1913). *Cf. In re* Perkins, 100 Fed. 950 (E.D.N.C. 1900).
[42] Darby v. Wesleyan Female College, 72 Ga. 212 (1883); Lightfoot & Flanders v. Freeman, 54 Ga. 215 (1875).

tempt. Where contempt in cases of constructive or indirect criminal contempt consists of acts or statements which are capable of two constructions, on of which would amount to contempt and the other not, intent becomes a material question, and if the contemnor denies under oath that he intended to violate a court order or rule, he is entitled to be discharged.[43] An attempt to legislate by statute in regard to purging of contempt has been done in a few states, *e.g.* New York and Indiana,[44] but generally it seems that purging of contempt has only been applied to constructive contempt and has gradually been dropped from our law, except where it has been revived by statute as aforementioned. However, in *Craig v. Hecht,*[45] this common law right to purge himself was acknowledged. It seems unfortunate though that for the majority the purging of contempt has thus been allowed to drop by the wayside.

Generally speaking, in constructive contempt, notice or hearing is required, but in direct contempt the court has power to punish summarily. This is supported by a heavy weight of authority, but is justice attained by such precedent? A party charged with contempt has the same right to be heard in his defense as a party charged with any other offense, where life, liberty, or property is involved.[46] In *People v. Zazove,*[47] the trial court had declined to permit defendant to state the facts which constitute his claim of privilege, or to give him an opportunity to justify his claim. On appeal it was said that even in direct contempt proceedings and even though summary he was entitled to a fair hearing and an opportunity to state the facts constituting his justification.[48] Also in *State* ex rel. *Rankin v. District Ct.,*[49] the court held that in a direct contempt proceeding an attorney must be given an opportunity to answer charges laid against him. (Here the attorney was not given an opportunity to show no contempt was intended and thus purge himself.) The result in the preceding case seems to follow the better practice as no one should be condemned without a hearing.[50] However, as a general rule, it is said that when a contempt is committed *in facie curiae,* the court may, in committing the offender, act of its own knowledge without further proof or examination, and

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[43] *In re* Rotwein, 291 N.Y. 116, 51 N.E.2d 669 (1943); State ex. rel. Indianapolis Bar Ass'n v. Fletcher Trust Co., 211 Ind.27, 5 N.E.2d 538 (1937).
[44] See note 43, *supra.*
[45] 263 U.S. 255 (1923); See also United States v. Shipp, 203 U.S. 563, 574 (1906).
[46] *See* State v. Nicoll, 40 Wash. 517, 82 Pac. 895, 896 (1905).
[47] 311 Ill. 198, 142 N.E. 543 (1924).
[48] *Cf.* People v. Spain, 307 Ill. 283, 138 N.E. 614 (1923); Sherman v. Peiole, 210 Ill. 552, 71 N.E. 618 (1904).
[49] 58 Mont. 276, 191 Pac. 772 (1920).
[50] 4 Encyc. Pl. & Pr. 789 (1896).

the accused is not entitled to be heard in his own defense, nor can he complain that his constitutional rights are infringed by the refusal of a hearing.[51] This, however, seems contrary to the fundamental conception of a court of justice which is condemnation only after hearing. Thus from the above discussion it can be seen that limitations upon an unqualified contempt power are by legislative action and by the judiciary itself.

Summary of Contempt Power To Punish Summarily

Thus it seems that following the result achieved in *Caldwell v. United States,* abandonment of due process requirements (notice, hearing, and counsel) is confined to a *narrow exception* which includes only charges of misconduct in open court, in the presence of the judge, which disturbs the court's business, where all essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent demoralization of the court's authority before the public.

Negligence — Contributory Negligence — The Doctrine Of Comparative Negligence

The doctrine of contributory negligence and its harsh results have been the subject of discussion by many legal writers.[1] At common law the slightest negligence of the plaintiff would bar his recovery from a negligent defendant if the plaintiff's negligence contributed proximately to the injury.[2] This doctrine was early

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[51] *Ex parte* Terry, 128 U.S. 289 (1888). *Cf. re* Savin, 131 U.S. 267 (1889); See Note, 57 A.L.R. 545.

[1] See Malone, *The Formative Era of Contributory Negligence,* 41 Ill. L. Rev. 151 (1946); Malone, *Comparative Negligence-Louisiana's Forgotten Heritage,* 6 La. L. Rev. 125 (1945); Mole and Wilson, *A Study of Comparative Negligence,* 17 Cornell L. Q. 333, 604 (1931); Comment, 26 N.D. Bar Briefs 30, 41-2 (1950).

[2] Bartson v. Craig, 121 Ohio St. 371, 169 N.E. 291 (1929) involved the following set of facts: The plaintiff, a minor, was coasting on a sled on an avenue which had been blocked off so that it could be used for that purpose, and turned the sled into another street, where he was struck by an automobile driven by the defendant's agent. The court instructed the jury that if they found "from the evidence that the plaintiff's own negligence directly caused or contributed in the slightest degree to cause the injuries complained of . . ." they should find for the defendant. On appeal this instruction was upheld. The court said, "The essential element of contributory negligence such as to bar the recovery by the plaintiff is not the comparative extent or degree of negligence. The test is rather whether the negligence of the plaintiff, whatever it be, caused or directly contributed to cause the accident and injury." See also Note, 114 A.L.R. 830 (1938).